Michael W. Bennett
Director -
Federal Regulatory

SBC Communications Inc.
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March 5, 1996

Ex Parte

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: ET Docket No. 90-314

Dear Mr. Caton:

In accordance with Commission rules, please be advised that yesterday, Wayne Watts, Al Richter, Pat Grant and the undersigned, representing SBC Communications Inc., met separately with Commissioner Chong and Suzanne Toller, Lisa Smith, Rudy Baca and Jackie Chorney to discuss Section 22.903 of the Commission's rules, including issues in the above-referenced docket. Specifically, we discussed how Section 22.903 would be impacted in light of the U.S. Court of Appeals' (Sixth Circuit) decision dealing with this rule. Attached are handouts provided in the meeting.

If you have any questions, please let me know.

Sincerely,

Attachments

cc: Commissioner Chong
Suzanne Toller
Lisa Smith
Rudy Baca
Jackie Chorney

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February 15, 1996

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Submission
GEN Docket No. 90-314

Dear Mr. Caton:

Today the attached document related to the above-captioned docket was provided to Barbara Esbin, Michele Farquhar and David Nall of the Wireless Telecommunications Bureau and Christopher Wright and Peter Tenhula of the Office of General Counsel on behalf of SBC Communications Inc. This information was provided as further clarification of issues discussed during a meeting on Tuesday, February 13, 1996 with the Wireless Bureau and the General Counsel's Office.

An original and one copy of this Notice are being submitted to the Secretary, with a copy served as well on each of the above-named FCC officials. Please contact me if you have any questions regarding this matter.

Respectfully submitted,

Richard M. Firestone

Enclosure

cc: Barbara Esbin, Esq.
Michele Farquhar, Esq.
David Nall, Esq.
Christopher J. Wright, Esq.
Peter Tenhula, Esq.

Wayne Watts, Esq.
Mr. Michael Bennett

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February 15, 1996

BY HAND

Barbara Esbin, Esq.,
Special Counsel for Competition
Commercial Wireless Division
Wireless Telecommunications
Bureau
Federal Communications
Commission
Room 7002
2025 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Submission in GEN Docket No. 90-314; Clarification of SBC's Request for Interim Relief

Dear Ms. Esbin:

This responds to your request for a clarification of the interim relief which our client, SBC Communications Inc. ("SBC"), is seeking from the requirements of Section 22.903 of the Commission's Rules. This matter was addressed in SBC's ex parte submission of February 13, 1996.

SBC believes it would be appropriate and in the public interest for the Commission to grant three forms of interim relief from the requirements of Section 22.903, either immediately or as part of any new notice of proposed rulemaking issued in this Docket. SBC believes that consumers would benefit directly and immediately by the grant of relief at this time, and that relief should not await the completion of any new rulemaking proceeding.

The three forms of interim relief SBC is seeking are:

- a waiver applicable to all Bell Operating Companies ("BOCs") of subsections (b)(2), (b)(3) and (b)(4) of Section 22.903;

- an amendment to subsection (d) of Section 22.903, to make clear subsection (d) only applies to transactions between the cellular subsidiary and the in-region incumbent local exchange carrier affiliated with the cellular subsidiary (as was the case under the predecessor rule, Section 22.901(c)(3)); and

- an extension to all BOC cellular affiliates of the recent CLLE waiver granted to SBMS.

You asked for clarification of the first two forms of interim relief and we explain each of them below:

1. Waiver of Subsections (b)(2), (b)(3) & (b)(4)

These subsections require that the cellular subsidiaries have separate officers; employ separate operating, marketing, installation and maintenance personnel; and, utilize separate computer and transmission facilities in the provision of cellular service. As such, they stand as obstacles to the kind of integrated offering of services -- on a "one-stop" basis -- which the Commission has found beneficial to consumers in numerous other contexts. A waiver of these subsections would be of immediate benefit to consumers.[1]

If these provisions were waived, consumers could promptly obtain from a single point of contact various forms of telecommunications services, as well as ongoing repair and maintenance services, and other features. In addition, a waiver would eliminate the unnecessary costs which the BOCs are forced to bear in order to provide services on a separated basis -- but which their competitors, including large, established competitors such as AT&T and GTE are able to avoid in connection with their integrated service offerings.

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[1] In light of Section 601(d) of the new Telecommunications Act of 1996, one aspect of these provisions -- the requirement that the cellular subsidiary maintain separate "marketing" personnel (which SBC interprets to mean actual sales personnel), as set forth in subsection (b)(3) of Section 22.903 -- is of questionable validity at this time.

On the other hand, even in the unlikely event that -- as a consequence of a new rulemaking proceeding -- the Commission were to decide to impose structural separation requirements on the entire wireless industry, the BOCs could promptly unwind any consolidations undertaken pursuant to an interim waiver of these subsections and return to the status quo ante. Indeed, when SBC reviewed the various requirements of Section 22.903 for purposes of deciding which should be dealt with by interim relief, it intentionally chose only those which could be unwound promptly should the Commission's ultimate decision have the effect of reversing the grant of an interim waiver. SBC believes that each of the items covered by subsections (b)(2), (b)(3) and (b)(4) meet that standard. If SBC (and the other BOCs) were granted an interim waiver of these subsections, and the Commission subsequently decided to reimpose some or all of these structural separation requirements, a reversion to the status quo ante could be accomplished within a reasonably short period of time.

2. Amendment to Subsection (d)

Subsection (d) of Section 22.903 governs transactions between the cellular subsidiary and, as currently written, the "BOC or its affiliates." In the opening sentence of Section 22.903, "BOC" was -- for the first time under this rule -- defined to include each of the Regional Holding Companies (RHCs) as well as their successors in interest and affiliated entities. Thus, as currently written, subsection (d) could be read to affect all transactions between a cellular subsidiary and its ultimate parent RHC, and all transactions between the cellular subsidiary and every single subsidiary and affiliate under the umbrella of the RHC.

This marks a material change from the prior Section 22.901(c)(3), which was the predecessor of Section 22.903(d) before the Part 22 Rewrite. While there was a reference to the RHCs and their affiliates in Section 22.901(b), the RHCs and their affiliates were not defined as "BOCs." Rather, in the subsequent subsections of Section 22.901 -- and in particular, in subsection (c)(3) which was the predecessor of Section 22.903(d) -- the reference was to transactions between the cellular subsidiary and the "carrier." The "carrier" was the in-region, established local exchange

carrier affiliate of the cellular subsidiary. The rule was not intended to address relations between two subsidiaries of an RHC which were already separate from the local exchange carrier.

In the case of SBC, the "carrier" is Southwestern Bell Telephone Company ("SWBT"). Thus, under the former Section 22.901(c)(3), only transactions between SBC's cellular subsidiary, Southwestern Bell Mobile Systems, ("SBMS") and SWBT were governed by Section 22.901(c)(3), consistent with the intent of the affiliate transaction rule. However, as rewritten, Section 22.903(d) now could be read to govern not only transactions between SBMS and SWBT, but also, all transactions between SBMS and SBC and all transactions between SBMS and all subsidiaries and affiliates of SBC (not limited to SWBT).[2]

Inasmuch as this aspect of the rewrite of Part 22 of the Rules was not intended to effect a substantive change, subsection (d) of Section 22.903 should be amended to restore it to the same meaning which that provision had under Section 22.901(c)(3). SBC has suggested, in the draft notice of proposed rulemaking which appears at Exhibit 2 to the ex parte submission of February 13, 1996, that this can be accomplished simply by deleting "the BOC or its affiliates" and substituting "its affiliated incumbent local exchange carrier(s)" at the beginning of subsection (d). SBC has suggested the use of the term "incumbent local exchange carrier" in order to correspond to the new definition adopted by the Telecommunications Act of 1996 (see new Section 251(h) of the Communications Act).

* * *

As noted above, SBC believes that the foregoing interim relief is both appropriate and in the public interest. SBC also believes it is plainly consistent with actions the Commission has taken in other contexts in order to foster competition and to promote immediate

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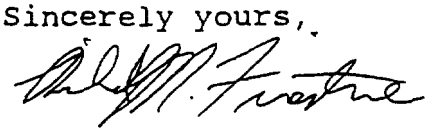
[2] This same issue was addressed in the Comments of SBC Communications Inc., In the Matter of Petition of Ameritech Communications for Partial Waiver of Section 22.903 of the Commission's Rules, at page 4 (filed Nov. 6, 1995).

benefits for consumers. Finally, SBC believes that the Commission should not delay granting this relief until it has concluded, or even until after it has commenced, a new rulemaking in this Docket. Rather, SBC believes that the relief should be granted immediately, or in no event later than the outset of -- and as a part of -- any new notice of proposed rulemaking.

We hope that the foregoing clarification addresses your questions and would be happy to provide any additional information at your convenience. Thank you again for your consideration.

Sincerely yours,



Richard M. Firestone

cc: Michele Farquhar, Esq.
David Nall, Esq.
Christopher J. Wright, Esq.
Peter Tenhula, Esq.
Wayne Watts, Esq.
Mr. Michael W. Bennett

March 4, 1996

In the Matter of	)	
	)	
Amendment of the Commission's	)	GEN Docket No. 90-314
Rules to Establish New Personal	)	
Communications Services	)	

Ex Parte Presentation of
SBC Communications Inc. ("SBC")

The public interest would be served by -- and the Commission is now required to proceed rapidly to consider -- the elimination of the cellular structural separation requirements of Section 22.903, in light of:

- the Commission's decision not to impose structural separation for PCS while retaining it for cellular;
- the Sixth Circuit's finding that that decision was "arbitrary and capricious" and its command that the FCC act now;
- the dynamic market forces underway today, and the regulatory anomalies created by a continuation of the cellular structural separation requirements particularly in light of the new legislation which eliminates the joint marketing restriction; and
- the fact that existing non-structural safeguards are fully adequate to address any remaining concerns regarding cross-subsidization or interconnection discrimination.

At a minimum, immediate interim relief is necessary and appropriate at this time.

The existing separation rule -- which applies only to the Bell Operating Companies (BOCs) and only to cellular service -- harms consumers and inhibits competition.

- It harms consumers because it deprives them of the benefits of integrated services and one-stop shopping, which the Commission has recognized on numerous occasions.

- In the absence of the rule, BOC customers would enjoy the option of a single point of contact for all purposes, including both wired and wireless services; they could obtain CPE as well as repair and maintenance services from the same personnel; they could use and pay for only a single voice mailbox serving multiple phones; and they could receive and pay only one bill.

The rule inhibits competition by requiring inefficiencies in the operations of the BOCs, which adds costs to consumers, and the rule fosters a number of regulatory anomalies. For example:

- GTE, one of the largest local exchange carriers, is <u>not</u> required to provide cellular service on a separated basis;

- The new PCS licensees are <u>not</u> required to operate separate from their local exchange affiliates; and

- In one county in Oklahoma, where SWBT is the local exchange carrier, it is allowed to integrate with SBMS's PCS service but prohibited from integrating with SBMS's cellular service in the <u>same</u> county.

Since the new legislation eliminates a significant aspect of the rule (by permitting joint marketing), the remaining portions of the rule simply impose unnecessary costs to achieve objectives which are adequately addressed through other means (i.e., through the non-structural safeguards).

For the foregoing reasons, the Commission should:

- reject the recent suggestion by AirTouch, Comcast and Cox that the Sixth Circuit decision requires the Commission to undertake a wide-ranging inquiry regarding "both the cellular structural and PCS non-structural rules"; and

- issue promptly a further notice of proposed rulemaking directed specifically at eliminating Section 22.903 (in whole or in part) as, in fact, the Sixth Circuit has directed.

Either before, or at the outset of this new proceeding -- which must be highly expedited under the 6th Circuit's mandate -- the Commission should immediately grant interim relief on its own motion, consisting of:

- a waiver, applicable to all BOCs, of subsections (b)(2), (b)(3) and (b)(4) of Section 22.903;

- an amendment to the definition of "BOC" for purposes of subsection (d) to make clear that "BOC" only means the LEC affiliate (as was the case under former Section 22.901); and

- an extension to all BOC cellular affiliates of the recent CLLE waiver granted to SBMS.

CONTENTS OF SBC'S EX PARTE PRESENTATION

I. BACKGROUND

- In the Broadband PCS Order in this proceeding, the FCC determined that "no new separate subsidiary requirements are necessary for LECs (including BOCs) that provide PCS." It found that there are substantial benefits to be derived from the combined offering of local exchange and PCS service and that the existing non-structural safeguards are sufficient to deter any potential discrimination and cross-subsidization. Broadband PCS Order, 8 FCC Rcd. 7700 at ¶¶ 112-27.

- At the same time, however, while recognizing the close similarity between PCS and cellular (which the FCC has recognized both in this proceeding and in the separate CMRS Docket 93-252), the Commission nevertheless concluded that:

> With regard to the structural separation requirement for BOCs and their cellular operations . . ., we do not believe the record in this proceeding provides enough information for us to eliminate the requirement at this time. . . . Id. at ¶ 126 n. 98.

- The Commission reached this conclusion notwithstanding the facts that: (a) the NPRM which preceded the Broadband PCS Order specifically solicited comments on whether structural separation should be eliminated for BOC cellular service (NPRM and Tentative Decision, 7 FCC Rcd 5676 at ¶ 76); (b) numerous parties commented on that question (including Ameritech, BellSouth, McCaw, NTIA, and NYNEX) and demonstrated why the rule should be eliminated; and (c) the few commenting parties who opposed elimination of the rule did so with nothing more than brief, conclusory statements which did not even address the fundamental reality that the non-structural safeguards already in place are fully adequate to address the concerns underlying the structural separation rule.

- On November 9, 1995, the 6th Circuit held that the Commission's failure to reconsider the BOC cellular structural separation rule -- and its failure to "[explain] . . . why it believed the record [was] insufficient to eliminate the structural separation rule, even in light of the fact that it found the requirement unnecessary in the

[PCS] context" -- was "arbitrary and capricious." Cincinnati Bell Telephone Co. et al. v. FCC et al., Docket Nos. 94-3701, et al., slip. op. at pp. 26, 28 (6th Cir., Nov. 9, 1995) ("Cincinnati Bell").

° The Court stated that "the time is now" for the FCC to reconsider whether to rescind the structural separation requirements and it said that "time is of the essence on this issue." Id. at pp. 28, 29.

° In its recent decision granting SBMS's CLLE service waiver, the Commission recognized that structural separation of competitive local exchange and cellular service out of region is unnecessary. MO&O in Docket No. CWD-95-5 (released Oct 25, 1995).

° SBC believes that the existing record in this and several other proceedings amply demonstrate that this same result should be reached with respect to the joint provision of local exchange and cellular service in region, since: (a) the existing non-structural safeguards

are fully adequate to address any potential discrimination and cross-subsidy concerns in region, which are the reasons for the structural separation requirements; (b) the same public interest benefits the Commission relied on in concluding that PCS could be integrated with BOC LEC activities apply equally to cellular; and (c) there is no reason to treat BOC cellular and PCS operations differently or to disadvantage BOC cellular operations competing with PCS and non-BOC cellular service providers.

° Therefore, in order to comply with the 6th Circuit's requirement for timely FCC action, and in light of the existing record already before the Commission in this and numerous other proceedings, SBC believes that the Commission can, and must, at a minimum:

(a) promptly issue a further NPRM specifically directed at eliminating Section 22.903 (in whole or in part), with the rulemaking to be completed on a highly expedited basis,[1] and

(b) immediately, or in conjunction with the issuance of this new NPRM, provide the interim relief described below.

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[1] Such an NPRM could follow the expedited model used by the FCC in the Financial Interest and Syndication ("Fin-Syn") Rules proceeding after the 7th Circuit's decision in that matter. A copy of that NPRM is attached hereto at Exhibit 1 and an edited version which could be used in this proceeding is attached hereto at Exhibit 2.

II. THE EXISTING RECORD: THERE IS NO NEED FOR STRUCTURAL SEPARATION IN CELLULAR

° The FCC has received scores of (both solicited and unsolicited) comments regarding the efficacy of the BOC cellular structural separation rule in numerous proceedings over the several past years (including Docket Nos. CC-92-115, GN-93-252, ENF 93-44, CC-94-54, and CWD-95-5).

° The record developed in these proceedings plainly demonstrates both that:

(a) the benefits of this structural separation rule are clearly outweighed by the benefits which would flow from the elimination of the rule and the costs of maintaining the rule; and

(b) the objectives of the rule are being achieved through other, less burdensome means -- i.e., the existing non-structural

safeguards -- as the Commission has found in the case of PCS and, more generally, for CMRS.

° The new legislation has highlighted the need for elimination of the rule by removing the joint marketing restriction (see Section 601(d)) and leaving behind certain restrictions and obligations which merely impose costs on the BOCs without providing any benefits which are not otherwise achieved by the existing non-structural safeguards.

III. THE 6TH CIRCUIT'S DECISION: PCS AND CELLULAR ARE THE SAME

° The 6th Circuit focused its analysis on three key considerations: (a) the Commission's own recognition of the similarities between PCS and cellular; (b) the absence of a reasoned basis for disparate treatment between the two services with respect to structural separation; and (c) the command of Section 332 of the Act (47 U.S.C. § 332, as amended by the Omnibus Budget Reconciliation Act of 1993) for regulatory symmetry among CMRS providers.

° The Court asked:

> If [PCS] and Cellular are sufficiently similar to warrant the Cellular eligibility restrictions and are expected to compete for customers on price, quality and services, . . . what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers? Cincinnati Bell, supra, at p. 29.

° Indeed, in this proceeding, the Commission has taken the position that the similarity of PCS and cellular services was one of the primary reasons for its cellular bidding restrictions in the PCS auctions.[2]

° A number of factors demonstrate that PCS and cellular services are in fact identical:

A. THE NETWORK FUNCTIONS ARE IDENTICAL

1. Each network consists of a series of low power cell sites established throughout the FCC licensed area.

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[2] The recent filing by AirTouch, Comcast and Cox (see letters of January 18, 1996 to Chairman Hundt and General Counsel Kennard) erroneously suggests that the Sixth Circuit has ordered the FCC to reexamine its determinations in the Broadband PCS Order regarding structural issues involved in LEC (including BOC) provision of PCS. The Sixth Circuit did no such thing. The Commission has already completed that analysis. Rather, what the Sixth Circuit has done is to direct the Commission -- in the face of the decision that a LEC (including a BOC) can provide PCS -- to analyze the narrow question of whether it still makes sense to preclude a BOC from providing cellular service.

2. Each cell site will re-use frequencies utilized by the cellular or PCS operator in other parts of the network.

3. Each network will allow for the handoff of calls from cell site to cell site as customers move through the licensed area.

4. Each network will utilize the same type of switching equipment.

B. THE VENDORS RECOGNIZE THAT CELLULAR AND PCS ARE IDENTICAL

1. At a CTIA sponsored wireless forum (held in October of 1993), every major wireless manufacturer in the world acknowledged that cellular and PCS are identical services which merely operate at different frequencies. A list of the attendees at this forum is attached hereto at Exhibit 3. As summarized by Keith Rainer, SBMS's Director of Wireless Services:

> "Each of the manufacturers represented agreed that PCS is cellular at a different frequency; PCS simply makes additional radio spectrum available for the offering of wireless mobile services." (Rainer Affidavit at p. 3)

2. All of the vendors agreed that the technical standards for PCS should be the same as cellular, simply upbanded from 800 MHz to 2 GHz.

3. The vendors stressed the possibility of dual mode (800 MHz/2 GHz) mobile phones and switches, and the need for a common air interface standard.

4. AT&T, for example, has developed a Number 5 ESS switch designed to be a platform on which both cellular and PCS networks can be built, and others are working on such platforms.

C. THE WIRELESS INDUSTRY AGREES THAT CELLULAR AND PCS ARE IDENTICAL

1. In a "PCS Handoff Waiver Request" recently filed with the DOJ, the Bell Companies argued that a Cellular Handoff Waiver, previously granted by Judge Greene, should be interpreted to apply to PCS because:

   - "The Bell Companies' PCS networks will in all relevant respects, be cellular systems by another name." (Waiver Request at p. 6) (emphasis added)

   - The PCS "networks will make use of a cellular architecture" by reusing frequencies. (Waiver Request at p. 6)

   - "The relationship between cell sites and mobile switches will be the same. . . ." (Waiver Request at p. 6)

- "BOC PCS providers may use the very same network infrastructure equipment as cellular carriers." (Waiver Request at p. 7)

- BOC PCS providers "will adopt the same technical standards" as cellular, including the IS-41 handoff standard. (Waiver Request at p. 7)

2. This Waiver Request was supported by Affidavits from various Bell personnel and representatives of numerous vendors.

3. The Cellular Telecommunications Industry Association ("CTIA"), in an affidavit of Tom Wheeler, its President and Chief Executive Officer, supported this Waiver Request, noting that:

- CTIA has a policy goal that "the vision of seamless North

American cellular service should be realized by adopting and implementing the IS-41 standard as quickly as possible." (Wheeler Affidavit at p. 2)

- "PCS carriers, just like cellular carriers, will use the IS-41 standard" to offer seamless services. (Wheeler Affidavit at p. 3)

- PCS and cellular are "likely to serve the same group of customers." (Wheeler Affidavit at p. 4) (emphasis in original)

- Disparate application of MFJ restrictions on BOC PCS and cellular operations would "harm consumers, who would be denied higher-quality, lower-cost services due to diminished competition among cellular and PCS providers." (Wheeler Affidavit at p. 4)